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CHARLES ELMORE CROPLEY

BRIEF OF APPELLEE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 704

IRENE MORGAN
Appellant

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

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BRIEF OF APPELLEE

STATEMENT

On July 16, 1944, the Richmond Greyhound Lines, Inc., a motor vehicle common carrier of passengers licensed by the State to operate over certain Virginia highways extending from Norfolk to the District of

Columbia, was engaged in operating one of its busses over said route. Both interstate and intrastate passengers were being carried.

The appellant, a member of the Negro race, was a passenger upon said bus, and there were also white passengers thereon. Her journey was from Gloucester County, Virginia, to Baltimore, Maryland, which was also the destination of the bus. Sections one to four, inclusive, of Chapter 128* of the Virginia Acts of Assembly of 1930 impose upon carriers so licensed, and upon their operating personnel, the duty to assign to white and colored passengers separate seats on their motor busses, but forbids any difference or discrimination in the quality of the accommodations. The statute itself does not undertake specifically to regulate the subject, but it requires the carrier to do so. Section five of the Act makes it a misdemeanor for any passenger to refuse to occupy the seats so assigned or to fail or refuse to change such seat if directed by the operator of the vehicle in accordance with a lawful custom or regulation in force by the carrier. The operator is first required to advise the passenger of the fact of such regulation and request him or her to conform thereto. The carrier's rules and regulations required the seating of white passengers from the front of the bus backward and colored from the rear forward (R. 31). Appellant, at the time in question, was occupying a space two seats forward from the

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*Set out in full in appendix to appellant's brief as Michie Code, Sections 4097z to 4097dd.

long rear seat, which was partly occupied by colored passengers. There were a number of white passengers standing but no colored. The driver directed appellant to change to one of the vacant rear seats, which were forbidden to white passengers. The purpose of this was to make room for a standing white passenger. The driver at the time explained to her the regulations of the carrier which required her to change her seat in the manner requested (R. 31). Under its printed rule T-22 the carrier reserved full control of the seating of passengers and of changing such seating at any time during the trip (Exhibit A, p. 32). Appellant refused to leave the seat she was occupying (R. 32). Thereupon the driver, Kelly, secured a warrant for her arrest upon a charge of violating section five of said Act. (Copy of Warrant, R. 24-25). The sheriff in executing the warrant asked her to change her seat, but she again refused. Thereupon the officer placed her under arrest (R. 32, 37, 38). Appellant was tried first before the trial justice, found guilty, and a fine of ten dollars imposed on her. Upon her appeal to the circuit court, after a trial *de novo*, she was convicted of refusing to comply with the driver's request that she change her seat as required by said section five of the 1930 Act and the rule of the carrier. A like fine of ten dollars was then imposed (R. 27-28). The Supreme Court of Appeals of Virginia affirmed the conviction and from its judgment this appeal was allowed.

The appeal challenges the validity of the State Act making it a misdemeanor for an interstate passenger traveling over Virginia highways to wilfully violate the carrier's lawful regulation providing for the as-

signment of separate seats for members of the white and colored races, or to refuse to change his or her seat in accordance with such a regulation when requested by the operator of the bus. Appellant makes no claim of discrimination in the quality of the accommodations provided by the carrier for the colored passengers. The statute (section two) expressly forbids "any difference or discrimination in the quality or convenience of the accommodations provided for the two races".

THE CONSTITUTIONAL QUESTION PRESENTED

As appears from the appellant's petition for a writ of error in the Supreme Court of Appeals of Virginia, the only ground upon which it was claimed that the statute is unconstitutional was that the provisions with respect to the seating of passengers on the bus cannot be applied to an interstate passenger without running afoul of the commerce clause of the Federal Constitution, Article 1, Section 8 (R. 2-3, 7, 18). This was the only constitutional question considered in the opinion of the court below (R. 58). Appellant has not challenged the well established principle that statutory segregation of the white and colored races does not violate the Federal Constitution. See *Plessy* v. *Ferguson*, 163 U. S. 537; *Gong Lum* v. *Rice*, 275 U. S. 78.

This general question of the effect of the commerce clause upon appellant's rights, however, would seem to involve several subordinate ones; first, whether the commerce clause confers upon appellant, as an interstate passenger, any different status than that occu-

pied by an intrastate passenger on a bus; second, whether the provisions imposing upon the carrier operating over Virginia highways the duties with respect to separate seating arrangements constitute a prohibited burden on its interstate commerce operations, and, third, whether appellant has any standing to complain of the carrier's alleged burden in the absence of complaint by the carrier.

SUMMARY OF ARGUMENT

I. The fact that appellant was an interstate passenger conferred on her no constitutional right to occupy any space on the bus other than that assigned by the carrier to members of her race.

II. Even if it should be assumed that the provisions of the statute requiring the carrier to adopt rules and regulations for the separate seating of white and colored passengers cannot be constitutionally applied to the operator of an interstate bus or to the transportation of interstate passengers, yet if the carrier actually adopts such regulations they nevertheless are valid and binding upon all passengers to which the carrier applies them, and violation of them may be punished by the State.

III. The challanged statute is a reasonable, proper, and valid exercise of the police power of the State to regulate the use of its highways.

IV. The appellant is without standing to challenge the constitutionality of the Act on the ground that it places an undue burden on interstate commerce.

V. Reply to appellant's brief.

I.

The Fact That Appellant Was An Interstate Passenger Conferred On Her No Constitutional Right to Occupy Any Space On the Bus Other Than That Assigned By the Carrier to Members of Her Race.

There have been a number of decisions of various courts, some of which intimate and others of which hold that an interstate railroad or steamboat passenger, as such, is possessed of some nebulous right which exempts him from State police regulations. Many of them seem grounded on the now discarded principle that the commerce clause prohibited the exercise of any State police power which in any way regulated anything or person connected with interstate commerce by rail or water, whether it operated as a substantial burden thereon or not. Some of the decisions turned on the fact that the accommodations furnished the interstate passenger of one race were of inferior quality to those provided for the other, or that the accommodations actually furnished violated the passenger's contract with the carrier. In cases of this kind the conclusion that the passenger's constitutional or contractual rights were violated was unquestionably correct. But in the absence of discrimination in the quality of the accommo-

dations there can be no sound reason why an interstate traveler in a bus also transporting intrastate passengers should have any superior rights over the latter. Any Virginia statute which would have the effect of according to an interstate passenger in such a vehicle operated on Virginia highways the right to occupy a seat beside a member of either race, while denying this right to an intrastate passenger, would seem to violate the equal protection clause of the Fourteenth Amendment. The mere fact that one passenger will continue his travels beyond the State line cannot furnish a basis for a different classification which would justify the discrimination against another who is an intrastate passenger. That such a distinction would so result was pointed out by Mr. Justice Day in his dissenting opinion in *South Covington & Cincinnati Street R. Co.* v. *Kentucky*, 252 U. S., at page 408, where he said:

> "The provision for a separate compartment for the use of only *intrastate* colored passengers would lead to confusion and *discrimination*." (Italics supplied).

The decisions of this Court clearly deny any such superior right to the interstate passenger over the intrastate one, or vice versa, in so far as regulation by the carrier is concerned. The first case involving the rights of a passenger in this respect is *Hall* v. *DeCuir*, 95 U. S. 485. A Louisiana statute provided that passengers on all public conveyances should be accorded free access to all parts thereof regardless of race or color. The plaintiff, a colored person, became

an *intra*state passenger on a steamboat licensed under Federal statutes for the transportation of passengers on the Mississippi River between various points in numerous States. She was refused admission to a cabin set apart for white passengers and obtained in the State court a judgment for damages against the owner of the vessel. This court, after pointing out the confusion and inconvenience to the carrier which would result from compliance with the statute, held that it imposed a substantial *direct burden* on the interstate commerce which the vessel was licensed to engage in, and was engaged in, and was therefore invalid. Since Congress had not acted in this field, it was said, the owner of the vessel was free to adopt such reasonable rules and regulations on the subject as he deemed to the best interest of all concerned. The decision not only denied to any passenger *the right* to occupy a space set apart by the carrier for those of another race, but also, in effect, denied the power of the State by legislation to *confer any such right* with respect to an interstate vessel under circumstances which would unduly burden the carrier. *The sole test applied was the right of the carrier to regulate the subject*, free from *burdensome* State regulations, and this right was predicated upon the fact that the carrier was operating the *vessel* in interstate commerce on the navigable waters of, and under license from, the United States. It is significant that the opinion of the Court was careful to point out the difference in the effect of the commerce clause on a State's regulation of commerce conducted over its turnpike and ferries. The distinction was thus stated:

"* * * The same is true of turnpikes and ferries. By such statutes the States regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control except when employed in foreign or interstate commerce. As they can only be used in the State, *their regulation for all purposes may properly be assumed by the State*, until Congress acts in reference to their foreign or interstate relations. When Congress does act, the state laws are superseded only to the extent that they affect commerce outside the State as it comes *within the State*. * * *" (24 L. Ed. 548. Italics supplied).

Thus the reverse of the rule applied to steamboats on navigable waters was held applicable to the regulation of commerce on the highways. With respect to the latter, failure of action on the subject by Congress was said to have the effect, not of leaving such commerce *free from regulation*, but of leaving the States *free to regulate same*. The instant case, of course, involves the regulation of the use of the Virginia highways by a common carrier of passengers.

The next case dealing with this question is *Louisville, Etc., Railway Company* v. *Mississippi*, 133 U. S. 587. The State statute required the carrier to provide separate coaches or compartments for white and colored passengers on all trains operated within the State. The railroad company was convicted of violation of

the separate coach requirement. This Court held that only intrastate commerce was the subject of regulation, although it affected trains coming into and moving beyond the State. It was said that neither the statutory provisions, which required the assigning of passengers to appropriate coaches, nor the rights or privileges of interstate passengers were involved. The fact that the Act required the carrier to attach an additional coach at the State line on incoming trains was held not to be an undue burden on interstate commerce.

Twenty years later this Court decided the case of *Chiles v. C. & O. Railway Company*, 218 U. S. 71. It involved a state of facts strikingly similar to the case at bar. A colored passenger had purchased a ticket entitling him to first class passage from Washington, D. C. to Lexington, Kentucky. At Ashland, Kentucky, he had to change trains and entered a car set apart exclusively for white passengers. Under protest he was moved to a car provided for colored passengers only. He brought suit against the carrier for damages upon the ground that his *rights as an interstate passenger* were violated by such removal. This Court pointed out that the Kentucky court had held that the accommodations being equal, the interstate passengers had *no right* to ride in any particular coach, but that, independent of State statute, *the carrier had the right* "to establish such rules and regulations as will require white and colored passengers, *although they may be interstate*, to occupy separate compartments upon the train". (Italics supplied). The judg-

ment of the Court of Appeals of Kentucky that no rights of the interstate passenger were violated was affirmed by this Court.

The application of the rule, which has now become firmly established in this Court, that the validity of a State regulation of or affecting interstate commerce is to be tested by the extent of the burden imposed *on the carrier* in conducting its operations, was exemplified in the case of *South Covington & C. Street R. Co.* v. *Covington*, 235 U. S. 537, where some of the regulations challenged were held unduly burdensome *upon the interstate carrier* and therefore invalid, while others were sustained. A few years later, in applying the test to other statutory regulations imposed upon the same interstate carrier, a Kentucky statute requiring separate coaches or compartments for white and colored passengers was sustained as to the carrier's operations in Kentucky, *although eighty per cent of the passengers therein transported were interstate*. The court said, "the regulation of the Act affects interstate business incidentally and does not subject it to unreasonable demands." *South Covington & C. Street R. Co.* v. *Kentucky*, 252 U. S. 399, 403-4. In neither case did the opinion contain any intimation that the statutes might be invalid because of infringement of the rights of interstate passengers.

It is respectfully submitted in conclusion on this point that the decisions of this Court establish beyond question that an interstate passenger has no constitutional right to occupy a seat in the conveyance of a carrier contrary to its rules and regulations. Whether

any significance is to be attributed to the fact that the carrier's regulations on the subject were adopted pursuant to a State statute will next be considered.

II.

Even If It Should Be Assumed That the Provisions of the Statute Requiring the Carrier to Adopt Rules and Regulations For the Separate Seating Of White and Colored Passengers Cannot Be Constitutionally Applied to the Operator of An Interstate Bus Or to the Transportation of Interstate Passengers, Yet If the Carrier Actually Adopts Such Regulations They Nevertheless Are Valid and Binding Upon All Passengers to Which the Carrier Applies Them, and Violation of Them May Be Punished By the State.

The decisions just reviewed establish beyond question the right of the carrier to adopt the regulations here under consideration, in the absence of State regulatory authority over the subject. They are therefore valid unless the statute requiring their adoption has the effect of invalidating them. The carrier not only adopted the regulations but its agent, the operator, enforced them against appellant and had a warrant issued for her arrest for their violation, although the statute imposed no duty so to do. It may be argued that the carrier acted under the duress or compulsion of the statute, in ignorance of its rights, but there is no evidence upon which to base such a contention. The carrier has never challenged the statute nor has it appeared as *amicus curiae* in this case, either here or in the court below, to register any dissatisfaction or

protest. In none of the numerous cases in which railroad carriers have provided separate cars or coaches for white and colored passengers does it appear that said carriers failed to extend their regulations to cover interstate passengers. In *Chiles* v. *C. & O. Ry. Co.*, *supra*, the carrier so extended its rules though the Kentucky segregation statute requiring same was held inapplicable to interstate trains by the Supreme Court of that State. This circumstance, however, was held by this Court not to affect the validity of the carrier's rule as applied to the interstate passenger.

To hold, because a State statute requiring the carrier to separate its white and colored passengers cannot be applied to interstate passengers, that same would nevertheless have the effect of depriving the carrier of the right to adopt and enforce its own rules which would accomplish that purpose, would be to give greater effect to such a positive legislative requirement than was given to the prohibitory one in *Hall* v. *DeCuir*, *supra*, where this Court held invalid a State statute which prohibited such segregation. The effect of such a rule as this would be to enable a State to prohibit segregation of interstate passengers by the carrier by merely enacting a statute *requiring* it.

Section 3 of the Act, under which the appellant was convicted, provides that any passenger refusing to obey the directions of the driver or operator of the bus with respect to changing his or her seat in conformity with a lawful rule, regulation, or custom of the carrier, after same has been explained to the passenger, shall be guilty of a misdemeanor. This

statute is a reasonable exercise of the State's police power, to which no valid constitutional objection can be offered so long as it is held that the carrier's regulation is itself a lawful one. If the regulation of the carrier is not lawful, then the statute, by its terms, is not applicable.

III.

The Challenged Statute is a Reasonable, Proper, and Valid Exercise of the Police Power of the State to Regulate the Use of Its Highways.

The statute is designed to promote the safety of the highways, as well as the peace and comfort of the passengers. The requirement that the carrier assign separate seats to the members of the two races is intended to avoid racial unpleasantnesses, frictions, disorders, or riots, on the busses while in operation. Such occurrences endanger the safety, not only of the occupants of the busses, but of other vehicles using the same highways. The busses are huge vehicles, operate at high speed, and safety requires the constant attention of the driver to the roadway ahead. A flare-up among the passengers which would distract his attention for only a brief moment might result in a collision with other vehicles or in running the bus into a ditch and overturning it. Although the application of the requirement to a bus engaged in an interstate journey, or to an interstate passenger thereon, would constitute a regulation slightly affecting commerce, same lies within the well recognized field of the State's police

power to regulate the use of its highways, and also other local matters incident to such commerce, in the absence of congressional regulation thereof.

The right of the State to require segregation of white and colored passengers *by motor vehicle carriers* has apparently never been challenged before; at least no such case has been found. This Court has in recent years emphasized the very much broader and more far-reaching powers which the State may properly exercise over its own highways than over the operation of interstate railroads. The cases dealing with State regulation of local matters affecting commerce are numerous. They have been exhaustively reviewed in the opinion of Mr. Chief Justice Stone in the cases of *Southern Pacific Co.* v. *Arizona,* ..... U. S. ..... (decided June 18, 1945), 89 L. Ed. Adv. Op., p. 1469. The opinion is so recent and contains such a clear and concise epitome of the previous decisions relating to the States' regulatory powers over their *highways,* and the general principles flowing from these decisions, that it seems appropriate to quote same in full at this point:

> *"South Carolina State Highway Dept.* v. *Barnwell Bros.,* 303 US 177, supra, was concerned with the power of the state to regulate the weight and width of motor cars passing interstate over the *highways, a legislative field over which the state has a far more extensive control than over interstate railroads.* In that case, and in *Maurer* v. *Hamilton,* 309 US 598, supra, we were at pains to point out that there are few subjects

of state regulation affecting interstate commerce which are so peculiarly of local concern as is the use of the state's highways. Unlike the railroads local highways are built, owned and maintained by the state or its municipal subdivisions. The state is responsible for their safe and economical administration. *Regulations affecting the safety of their use must be applied alike to intrastate and interstate traffic.* The fact that they affect alike shippers in interstate and intrastate commerce in great numbers, within as well as without the state, is a safeguard against regulatory abuses. Their regulation is akin to quarantine measures, game laws, and like local regulations of rivers, harbors, piers, and docks, with respect to which the state has exceptional scope for the exercise of its regulatory power, and which, Congress not acting, have been sustained even though they materially interfere with interstate commerce (303 US at 187, 188, and cases cited)." (89 L. Ed. Adv. Op. 1469, 1481-1482. Italics supplied).

As pointed out by Justice Gregory in the court below (R. 64, 65), Congress has repeatedly resisted efforts to induce it to enact legislation to prohibit the segregation of interstate passengers, and his opinion concludes that "This continued refusal of the Congress to legislate in the segregation field demonstrates its desire that the matter be left where it is now; that is, that the several States, under their police power, be permitted to continue to legislate in this field, subject

only to the limitation that they shall not directly or unreasonably burden interstate commerce." Certainly with respect to the regulation of the use of State highways there can be no doubt as to the correctness of this conclusion. It is clear also that the regulation of the subject by the carrier as authorized by the Virginia statute is not such a prohibited burden.

NATURE OF THE REGULATION HERE INVOLVED

The statute requires only that the carrier assign separate seats to the members of the white and colored races, and change such assignments from time to time to conform to variations in the number of passengers of each race. It does not undertake to designate any particular part of the bus for use by either race, but does provide that the accommodations shall be equal in quality. It also imposes upon the driver or operator of the bus the duty to require each passenger to occupy a seat in the space assigned to members of his or her race, and vests him with powers of a conservator of the peace to enforce order thereon.

As to the burden imposed on the carrier in conducting its operations, it is insignificant compared to segregation requirements which have been imposed on railroads and have been sustained by this Court. Thus in *Louisville, Etc., Railway Co.* v. *Mississippi, supra*, it was necessary to attach an additional coach to an interstate train on entering the State, but this was held not prohibited by the commerce clause. The Virginia statute does not necessitate any different or additional equipment of any kind. Separate compartments are not even required.

In *Plessy* v. *Ferguson, supra,* "the preservation of public peace and good order" was recognized as the legitimate and proper objective of the statute (163 U. S. 550). Likewise a regulation for seating passengers "so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well known customary repugnancies which are likely to breed disturbances, where white and colored persons are huddled together without their consent" was said by Mr. Justice Clifford in *Hall* v. *DeCuir, supra,* to be a reasonable one. (24 L. Ed. 553.)

In *Alabama, Etc., R. R. Co.* v. *Morris.* 103 Miss. 511, the court, in sustaining a segregation statute, said:

> "A riot upon an interstate train growing out of the refusal of common carriers to recognize a situation known to every Mississippian—black and white—would endanger the lives and disturb the peace of all persons passengers on the train, intrastate and interstate; and we therefore decline to limit the application of the statute to intrastate commerce. Possessing the knowledge of local conditions common to all residents of our section, we confess some surprise that there was no sequal to the event described by the record."

The following is a quotation from a similar case, *Smith* v. *State,* 100 Tenn. 494:

> "* * * If it be true, as is sometimes said, that race prejudices exist here that make it un-

comfortable or unsafe or promotive of disorder to mix the races in public conveyances, then both safety and good order are promoted as well as comfort, in their separation. The State is to judge of the necessity for such a regulation. * * *."

The opinion of Mr. Justice Gregory in this case reflects the same line of thought. He said: "If the statute were held to be valid as to intrastate passengers and invalid as to interstate passengers, a condition would exist that would adversely disturb the peace and welfare." (R. 66,)

The prevention of racial friction, disorders and conflicts has always been the avowed and accepted basis for the enactment of segregation laws. Disorders or disturbances suddenly breaking out on a rapidly moving bus are fraught with far more dangerous consequences than on a railroad train. The fact that section 4 of the Act vests the driver or person in charge of the bus with the powers of a special policeman and conservator of the peace in the enforcement of order emphasizes the importance attributed by the legislature to the maintenance of peaceful conditions on the bus. Usually the driver is the only agent or employee of the carrier on the vehicle. It is imperative that his attention to his duties be not suddenly interrupted by disorders breaking out among the passengers as has been heretofore pointed out. Such an occurrence would not only endanger the safety of the bus and its occupants, but would imperil the safety of the highways. Other vehicles using them would be subjected to the threat

of collission with the bus if the driver's vigilance is diverted to the suppression of disorders. The burden rested upon appellant to show that the statute imposed an undue burden on interstate commerce. *Bourjois* v. *Chapman*, 301 U. S. 183, 187, 188. Yet no effort was made by her in the circuit court to introduce evidence to show that the statute is unreasonable or not supported by the facts or the conditions prevailing in Virginia. As said in *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 191-192:

> "* * * Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis. *Standard Oil Co.* v. *Marysville*, 279 U. S. 582; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 263. * * *"

A regulation so completely in accord with the established public policy of Virginia as expressed in the court below (R. 60), and with the customs and usages in many other States as appears from the numerous reported cases on the subject, cannot be found by this Court to be "without rational basis."

IV.

The Appellant is Without Standing to Challenge the Constitutionality of the Act on the Ground that It Places an Undue Burden on Inerstate Commerce.

The decisions of this Court heretofore discussed have clearly demonstrated that no constitutional right of an interstate white or colored passenger is violated by being required by the carrier to occupy the seating space assigned to members of his or her race. This is precisely the situation here presented. Before the statute could be considered an impermissible burden on commerce it would be necessary to show that the carrier is being hampered in its transportation activities. But the carrier is not complaining that any such burden or obstruction to its business results from the obligations imposed on it by the Act. In fact the carrier itself issued the regulations involved, and initiated the arrest and prosecution of the appellant for refusal to abide by its rules. Certainly the appellant has no standing to complain that the carrier is being unduly burdened. The only complaint the carrier has made was against the appellant for violation of its regulations. In order to prevail here the appellant "must show that the enforcement of the challenged judgment would deprive it (her)—not another—of some right arising under the Constitution or laws of the United States properly asserted below." *Liberty Warehouse Co.* v. *Burley T. G. Co-op. M. Asso.*, 276 U. S. 71, 88*. The

*To the same effect see also *Southern Railway Co.* v. *King*, 217 U. S. 524, 534; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Hendrick* v. *Maryland*, 235 U. S. 610, 621; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576.

enforcement of the rules and regulations of the carrier have not deprived her of any right, nor has she any standing to complain of them or of the statute imposing a fine on her for their violation.

V.

Reply to Appellant's Brief

In her *summary of argument* appellant says:

> "For seventy years the decisions and pronouncements of this Court have consistently condemned state statutes attempting to control or require the segregation of Negro passengers moving in interstate commerce on public carriers as unconstitutional invasions of an area where national power under the commerce clause is exclusive. Unless the reasoning of those cases was or is unsound, they should be followed."

As a matter of fact, no case has ever been decided by this Court involving the validity of a State statute *requiring* segregation of white and colored *interstate* passengers. There have been intimations in cases involving *railroads* that such statutes *might* be considered unconstitutional if the question were before the Court, but the question has never been before the Court and no decision to that effect has ever been rendered. After all, each such case would have to stand upon its own facts and be subjected to the test applied in *Hall v. DeCuir, supra.* It might be considered more con-

venient for the railroad carrier to provide separate accommodations for white and colored interstate passengers in States having such requirements for local passengers than to undertake to make a distinction between them. In fact, the reported cases indicate this to have been the usual custom of railroads, independent of statute. The conclusion to be reached would necessarily depend upon whether the application of the statute, in any particular case, would constitute an undue burden on conducting the commerce involved. There has been no such case decided here involving a railroad. There has never been even an intimation with respect to the rule which would apply to a motor vehicle carrier in such a case in the absence of congressional action.

APPELLANT'S ARGUMENT

Appellant takes the position that *Hall* v. *DeCuir*, *supra*, conclusively establishes the principle that State statutes providing for separate accommodations for white and colored passengers "on public carriers" contravene the commerce clause. But the Court's opinion expressly says that its conclusions therein expressed do not apply to highways owned by the States. As heretofore pointed out in this brief, *Hall* v. *DeCuir* involved the sole question of the validity of a State statute *prohibiting* the carrier from providing such separate accommodations. It related only to a steamboat operating on navigable waters of the United States, which in crossing the river would at short intervals find itself

in different States. Under the facts in that case, the Court held the statute obnoxious to the commerce clause, because it imposed an undue burden on interstate commerce which was subject to the regulatory powers of Congress. "Inaction by Congress," it was said, "is equivalent to a declaration that interstate commerce shall remain free and untrammelled." But lest its decision might be interpreted as applying the quoted principle to State statutes regulating traffic on ferries and *highways* the Court took the pains to disclaim any such intention by saying:

> "* * * The same is true of turnpikes and ferries. By such statutes the States regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control except when employed in foreign or interstate commerce. As they can only be used in the State, *their regulation for all purposes may properly be assumed by the State*, until Congress acts in reference to their foreign or interstate relations. When Congress does act, the state laws are superseded only to the extent that they affect commerce outside the State as it comes *within the State*. * * *" (24 L. Ed. 548. Italics supplied.)

Thus, under this principle laid down in *Hall* v. *DeCuir*, Congress, by refusing to enact legislation touching this subject of segregation of passengers on busses has left to the State the regulation of same on

its highways. Congress has evidently taken cognizance of the obvious fact that local conditions are so different in the various States that no uniform regulations could be satisfactorily applied. And it recognizes also the proprietary interest of the States in such matters. The Commonwealth of Virginia has purchased and owns the fee simple title to its highways; it has built and constructed them; it repairs and maintains them in good condition; it patrols and polices them, and enforces obedience to traffic regulations and the general laws against crime. To require different regulations for intrastate and interstate passengers on busses would surround law enforcement on the highways with constant confusion and doubt. It would seriously impair the effectiveness of the use of the roads as an instrumentality of both local and interstate commerce. The necessity for such State uniformity of regulation with respect to its roads was recently emphasized by this Court in these words: "Regulations affecting the safety of their use must be applied alike to intrastate and interstate traffic." *Southern Pacific Co.* v. *Arizona, supra.* It is no doubt because of its recognition of the truth of this statement that Congress has declined to enact any regulation which would accord to an interstate passenger traveling over State highways any status different from that of the local citizen. The application of the separate seating requirements to local passengers alone would seriously jeopardize the safe operation of the bus. Instead of reducing the burden on commerce it would immeasurably increase it. There would be constant danger of quarrels, frictions and disturbances due to misunderstandings among the

passengers as to who are subject to the regulations and who are exempt from them.

Appellant's brief (pp. 12-14) quotes extensively from the Maryland case of *Hart* v. *State*, 100 Md., at 612-3. In this case the *railroad* had not promulgated any regulations with respect to seating arrangements and the view was expressed that should the case reach this Court the statutory regulations would be held inapplicable to interstate passengers. For this reason, the Maryland court construed the statute as embracing only intrastate travelers. But the opinion recognized the right of the railroad to adopt segregation regulations as to interstate passengers in States which do not have them. By the adoption of such regulations by the carrier the possibility of the occurrence of the frequent changes from one railroad car to another, which was suggested in appellant's quotation from the opinion could be readily obviated. However, the inconveniences depicted would have no application to passengers on a bus, where the only change is from one seat to another in the same vehicle. This is no more difficult than moving from one chair to another in the same room in one's home. The changing of seats by the passenger is a little thing compared with the resulting benefits in safety, peace and comfort, for there is a wide difference in the effect of disorder on a railroad train and on a motor bus. A disturbance in a railroad coach does not affect the engineer of the train, but such an occurrence on a bus almost certainly would disconcert the driver, endangering not only all the passengers, but also persons traveling in other cars on the highway.

Appellant repeatedly asserts that no element of safety is involved in the requirement of separate seats for white and colored passengers. And yet this case of *Hart* v. *State*, which she so strongly invokes, contains and approves the following quotation from a Pennsylvania case:

> "* * * 'In order to preserve and enforce his (the conductor's) authority as the servant of the company, it must have a power to establish proper regulations for the carriage of passengers. It is much easier to prevent difficulties among passengers by regulations for their proper separation than it is to quell them. The danger to the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. If a negro take his seat beside a white man or his wife or daughter, the law cannot repress the anger or conquer the aversion which some will feel. However unjust it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation than to punish afterward the breach of the peace it may have caused.' There are numerous cases to the same effect, many of which are cited in *Chilton* v. *St. Louis & I. M. R. Co.*, 114 Mo. 88, 19 L. R. A. 269; *Smith* v. *Chamberlain*, 38 S. C. 529, 19 L. R. A. 710; *Ex parte Plessy*, 45 La. Ann. 80, 18 L. R. A. 639; *Bowie* v. *Birmingham Ry.*

& Electric Co., 125 Ala. 397, 50 L. R. A. 632; and the notes to those cases, as reported in the L. R. A. series." (60 Atl., at p. 458).

The foregoing is undoubtedly a correct statement of the reasons underlying and necessitating statutes of this kind. However much we regret it, we must nevertheless face the truth and not deceive ourselves by idealisitc or wishful thinking. Virginia, along with many other States similarly situated, is confronted with a condition, not a theory. If this condition could be removed by the passage of a law or a decision of a Court, there would be none to oppose it. But laws cannot alter human nature or erase racial antagonisms. They are not confined to our country or to our people. They are world-wide. Only the great Master who created and endowed mankind with these infirmities can eradicate them. Until that occurs our government must be based upon the recognition that they still exist.

Appellant has not even attempted to show by the citation of any judicial decision that she was possessed of any right to occupy the seat from which she was requested to move. She bases her argument solely upon the alleged want of power in the State to regulate the conduct of an interstate passenger. To such a passenger she would accord a status immune from the laws which govern the citizens of Virginia engaged in local travel. But she cites no authority to sustain such a remarkable claim.

Appellant asserts that free movement through a State is a constitutional guaranty. This may be con-

ceded. But the free movement guaranteed does not mean immunity from State regulations imposed in the exercise of the police power which do not discriminate against the interstate traveler and are likewise applicable to the local citizen. But this does not satisfy appellant. She insists that free travel means discrimination in her favor and against a resident of the State through which she is passing.

Appellant repeatedly asserts that statutes of the kind here involved are based upon provincial notions which do afford a substantial basis for such legislation. But the quotation hereinabove from the Pennsylvania court would hardly justify this criticism. The people of that State had fought a long war to free the Negro from slavery and their legislature must be considered as motivated under then existing conditions by necessity rather than prejudice in passing legislation of this type. Certainly the decision of the court sustaining its validity so indicated.

Appellant also attacks the statute because some interstate travelers may have such an admixture of white and colored blood as to render it difficult for the agents of the carrier to determine whether they should be classified as white or colored. She does not claim to fall in that category, nor is the carrier complaining of any such burden. She therefore has no standing in this Court to attack the validity of the Act because it may possibly deprive other persons of some constitutional right, as the cases cited under point IV, *supra*, clearly show.

Appellant's arguments in the main constitute a challenge to the wisdom of the legislature in enacting the

statute. But this is a matter with which this Court is not concerned. In the absence of convincing evidence that conditions in Virginia do not justify the legislation, the presumption that it is supported by existing facts known to the legislature will be conclusive unless facts judicially known preclude that possibility.—*South Carolina State Highway Dept. v. Barnwell, supra.* The record contains no evidence at all on the subject. It would seem, therefore, that these arguments might more appropriately be addressed to Congress in advocacy of desired regulatory legislation than to this Honorable Court.

CONCLUSION

The judgment of the court below is clearly right and should be affirmed.

Respectfully submitted,

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Supreme Court—State Library Building,
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